Validity of Condition in a Will Against Contest.

There is considerable conflict in this country on the question of the validity of a clause in a will which provides that there shall be a forfeiture if the legatee contests the will. A testator undoubtedly has the right to dispose of his property as he sees fit, so long as he violates no law or principle of public policy. Such a condition is not in violation of any law, but is it in accord with a sound public policy? The case of *Moran* v. *Moran*[1] answers this in the affirmative, holding the condition valid under all circumstances.

In England, according to early cases, where the subject of the disposition is personalty and there is no gift over, a condition against contest is regarded as *in terrorem* merely, and unenforceable if there are reasonable grounds for litigation.[2] But where there is a gift over, or an express direction that the property shall fall into the residue, such a provision is regarded as a conditional limitation and is held valid, because it is considered that the rights of third parties rest on its breach.[3] This distinction does not appear to be sound. If the condition is invalid, it is certainly immaterial whether there is a gift over or not, because no rights of third parties could rest on the breach of an invalid condition.

But where real property is the subject of disposition, the gift is held valid even though there is no gift over.[4] The distinction thus made between real and personal gifts seems to be due to the fact that the ecclesiastical courts followed the civil law, which regarded such a condition as in *terrorem* merely, and equity followed the rule of the ecclesiastical courts in respect to legacies, and that of the common law in respect to land. There is no sound reason for any such distinction, and it has been abandoned by the great majority of the courts in this country.

Three different views have been advanced in this country. In an early case in South Carolina,[5] the chancellor regarded such conditions as absolutely void, on the ground that it was against public policy to obstruct a citizen at the risk of forfeiture from ascertaining his rights by the law of the land. In

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[1] 123 N. W. 202 (Iowa).

[2] *Powell* v. *Mcrgan*, 2 Vernon, 90; *Morris* v. *Burroughs*, 1 Atk. 404; see also *Loyd* v. *Spillet*, 3 P. Wms. 344.

[3] *Cleaver* v. *Spurling*, 2 P. Wms. 528.

[4] *Cooke* v. *Turner*, 15 Mee & W. 727.

[5] *Mallet* v. *Smith*, 6 Rich. Eq. 12.

our principal case, *Moran* v. *Moran*,[6] on the other hand, the majority of the Court took the view that no question of public policy is raised—that such conditions are valid under all circumstances. This result has been reached in perhaps a majority of the decisions in this country.[7]

It is argued that the validity or invalidity of a will ordinarily affects only the interests of the parties to the controversy; that it is immaterial so far as the public generally is concerned whether the heir or the devisee takes. An intermediate stand has been taken by the courts of Pennsylvania and New York. The language of the first Pennsylvania case on the question would seem to retain the arbitrary distinctions made in England,[8] but this has been modified by recent decisions, and the rule now is that a condition against contest is invalid if there is reasonable ground for such contest, but valid otherwise.[9]

This view is favored by a modern text-writer,[10] and certainly seems sounder and more reasonable than that of our principal case. It discourages useless and vexatious litigation, but does not hinder or obstruct one who honestly believes that there has been fraud or undue influence. There seems considerable force in the argument of the dissenting judge in *Moran* v. *Moran*,[11] that one who has unduly influenced a testator would have a condition of this nature inserted, to be "a roaring lion intended to terrorize every beneficiary under the will." It is more in accord with a sound public policy that a contest of a will in good faith on reasonable grounds should be allowed without the penalty of forfeiture if the will should be sustained.

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[6] 123 N. W. 202 (Iowa).

[7] *Bradford* v. *Bradford*, 19 Ohio St. 546; *Thompson* v. *Gaut*, 14 Lea (Tenn), 310; *Hoit* v. *Hoit*, 42 N. J. Eq. 388; *Donegan* v. *Wade*, 70 Ala. 501.

[8] Chew's Appeal, 45 Pa. 228.

[9] Lynn's Estate, 48 Pittsb. Leg. J. 259; *In re* Owens, 49 Pittsb. Leg. J. 257; Friend's Estate, 209 Pa. 442; *Jackson* v. *Westerfield*, 61 Howard Pr. 399 (N. Y.). See also *Smithsonian Institution* v. *Meech*, 169 U. S. 398. But in the latter case the court retains the old English rule that where there is a gift over, the condition is valid.

[10] Schouler on Wills (3rd ed.), § 605.

[11] See Note 1.